Abdul Razak bin Jundar Khan & Ors v Mustapha bin Mohammed & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1929–09 OF 2018
AHMADI ASNAWI, ABDUL KARIM AND SURAYA OTHMAN JJCA
19 SEPTEMBER 2019

Contract — Settlement agreement — Breach — Employer of appellants and fourth respondent entered into settlement agreement — Appellant claimed breach of trust emanated from settlement agreement against fourth, fifth and sixth respondents — Whether there was constructive trust — Whether proviso to cl 11(1) of settlement agreement to be given literal interpretation or purposive construction

The appellants were residents of Padang Meiha Estate ('PME') and were the former employees of East Asiatic Company (M) Bhd ('EACM'), the owners of PME. On 9 March 1994, by a sale and purchase agreement ('SPA'), EACM sold and the fourth respondent purchased the estate, free from encumbrances and with vacant possession and subject to all the terms and conditions therein. Consequently, the appellants' employments with EACM were terminated. On 8 March 1995, PME was duly transferred and registered in the second respondent's name pursuant to the said SPA. In accordance with the terms of the said SPA, the second respondent had offered employment to the former workers of PME. However, only 19 of those former workers accepted the offer. Subsequently, the fourth respondent commenced an action against EACM for vacant possession of the said estate where the suit was amicably settled on 8 November 1995 where it was agreed that EACM to pay to the fourth respondent or its nominees a total sum of RM7,055,838.30 as full and final settlement of the fourth respondent's claim in the suit. The cause of action of the appellants for breach of trust emanated from the said terms of settlement ('the settlement agreement'). The appellants' claim was solely confined to cl 11(1)(ii) of the settlement agreement for termination and lay-off benefits and for services rendered as former employees. The learned trial judge dismissed the appellants' claim against the fourth, fifth and sixth respondents and hence this appeal.

Held, allowing the appellants' appeal and setting aside the order of the trial judge:

(1) The trial judge erred in failing to consider the clear and express intention of both EACM and the fourth respondent when they executed the settlement agreement. The names of the appellants listed in schedule 1

was a clear indication that the parties had all along agreed to reserve the sums mentioned in cl 11(1)(ii) of the settlement agreement for the eventual distribution to the appellants. The learned trial judge took a very simplistic approach of the issues and had ignored the true purport and intent of the parties when they executed the settlement agreement. A constructive trust was created in respect of the sums provided in cl 11(1)(ii) in favour of the appellants. It would be plainly unconscionable for the fourth respondent to exert its rights over the sums paid under cl 11(1)(ii) of the settlement agreement to the exclusion of the appellants when the said sums were not meant for the fourth respondent from the very beginning (see paras 22, 29–30 & 34–35).

(2) The discretion conferred by the proviso could not be construed in the manner as construed by the learned trial judge as this would render the said terms of the agreement otiose. The said proviso could not have the effect of completely negating the said clause. Hence, the said proviso could not be read and given a literal interpretation but must be given a purposive construction, based on the true purport and expressed intention of the contracting parties (see paras 38 & 40–41).

[Bahasa Malaysia summary

Perayu adalah penduduk Padang Meiha Estate ('PME') dan merupakan bekas pekerja East Asiatic Company (M) Bhd ('EACM'), pemilik PME. Pada 9 Mac 1994, dengan perjanjian jual beli ('PJB'), EACM menjual dan responden keempat membeli estet itu, bebas daripada bebanan dan milikan kosong dan tertakluk kepada semua terma dan syarat di dalamnya. Akibatnya, pekerjaan perayu dengan EACM telah ditamatkan. Pada 8 Mac 1995, PME telah dipindahkan dan didaftarkan pada nama responden kedua menurut PJB tersebut. Selaras dengan terma PJB tersebut, responden kedua telah menawarkan pekerjaan kepada bekas pekerja PME. Walau bagaimanapun, hanya 19 orang bekas pekerja yang menerima tawaran tersebut. Selepas itu, responden keempat memulakan tindakan terhadap EACM untuk milikan kosong estet tersebut di mana guaman itu diselesaikan dengan baik pada 8 November 1995 di mana ia telah bersetuju bahawa EACM akan membayar kepada responden keempat atau penamanya sebanyak RM7,055,838.30 sebagai penyelesaian penuh dan muktamad tuntutan responden keempat dalam guaman itu. Kausa tindakan perayu untuk pecah amanah yang timbul daripada terma penyelesaian ('perjanjian penyelesaian'). Tuntutan perayu semata-mata terbatas kepada klausa 11(1)(ii) perjanjian penyelesaian untuk pemberhentian dan faedah pemberhentian dan untuk perkhidmatan yang diberikan sebagai bekas pekerja. Hakim bicara yang bicara menolak tuntutan perayu terhadap responden keempat, kelima dan keenam dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan perayu dan mengetepikan perintah hakim bicara:

(1) Hakim bicara terkhilaf kerana gagal mempertimbangkan niat jelas dan nyata kedua-dua EACM dan responden keempat ketika mereka melaksanakan perjanjian penyelesaian. Nama-nama perayu yang disenaraikan dalam jadual 1 adalah petunjuk jelas bahawa pihak-pihak telah sepakat bersetuju untuk menyimpan jumlah yang disebutkan dalam klausa 11(1)(ii) perjanjian penyelesaian untuk pembahagian terakhir kepada perayu. Hakim bicara yang bijaksana mengambil pendekatan yang sangat mudah tentang isu-isu dan telah mengabaikan maksud sebenar dan niat pihak-pihak ketika mereka melaksanakan perjanjian penyelesaian. Sebuah amanah konstruktif telah dibuat berkenaan dengan jumlah yang diberikan dalam klausa 11(1)(ii) yang memihak kepada perayu. Adalah jelas tidak dapat disangkal bagi responden keempat untuk mengerahkan haknya ke atas jumlah yang dibayar di bawah klausa 11(1)(ii) perjanjian penyelesaian kepada pengecualian perayu apabila jumlah tersebut tidak dimaksudkan untuk responden keempat dari mulamya (lihat perenggan 22, 29–30 & 34–35).

(2) Pertimbangan yang diberikan oleh proviso tidak boleh ditafsirkan mengikut cara yang dianggap oleh hakim bicara yang bijaksana kerana ini akan menjadikan terma-terma perjanjian sebagai sia-sia. Proviso tersebut tidak dapat memberi kesan sepenuhnya menafikan klausa tersebut. Oleh itu, proviso tersebut tidak boleh dibaca dan diberikan tafsiran harfiah tetapi harus diberikan tafsiran konstruktif, berdasarkan maksud sebenar dan niat nyata pihak berkontrak (lihat perenggan 38 & 40–41).]

Cases referred to

Bank Bumiputra Malaysia Bhd v Mohamed bin Salleh [2000] 2 MLJ 412; [2000] 2 CLJ 13, CA (refd)

Carl Zeiss Stiftung v Herbert Smith & Co And Another (No 2) [1969] 2 Ch 276, CA (refd)

Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal [2006] MLJU 649; [2007] 3 CLJ 413, CA (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Appeal from: Suit No WA-22NCC-418–12 of 2016 (High Court, Kuala Lumpur)

Ranjan Chandran (Nandhini Devi Nagaindren and Chandni Anantha Krishnan with him) (Hakem Arabi & Assoc) for the appellants.

Lim Jun Rui (Bodipalar Ponnudurai De Silva) for the first, second and third respondents.

Intan Azlina Mazlan (Khan & Mazlan) for the fourth, fifth and sixth respondents.

Ahmadi Asnawi JCA:

[1] This appeal is only against the fourth, fifth and sixth respondents.

[2] The appellants were residents of Padang Meiha Estate ('PME') and were the former employees of East Asiatic Company (M) Bhd ('EACM'), the owners of PME.

[3] On 9 March 1994, by a sale and purchase agreement ('SPA'), EACM sold and MBF Holdings Bhd ('MBFH'), the fourth respondent, purchased the estate, free from encumbrances and with vacant possession at a purchase price of RM115,878,492 and subject to all the terms and conditions therein.

[4] Consequently, the appellants' employments with EACM were terminated.

[5] On 8 March 1995, PME was duly transferred and registered in the second respondent's name, Alamanda Development Sdn Bhd (formerly known as MBF Country Homes & Resort Sdn Bhd) pursuant to the said SPA.

[6] In accordance with the terms of the said SPA, the second respondent had offered employment to the former workers of PME. However, only 19 of those former workers accepted the offer.

[7] Subsequently, the fourth respondent commenced an action against EACM for vacant possession of the said estate vide Kuala Lumpur High Court Suit No S1–22–156 of 1996 ('the KLHC Suit'), dated 6 May 1995.

[8] The KLHC Suit was amicably settled on 8 November 1995 where it was agreed, inter alia, vide cl 11(1)(i), (ii) and (iii), as follows:

> 1. In consideration of MBFH agreeing to withdraw the suit in accordance with the terms of this Agreement, EACM hereby agrees to pay to MBFH or its nominees a total sum of RM7,055,838.30 as full and final settlement of MBFH's claim in the suit which sum is made up as follows:
>
> (i) A sum of RM3,600,000.00 in respect of MBFH's claim for vacant possession without admission by EACM of any liability to MBFH;
>
> (ii) Without admission by EACM of any liability to the Employees, a sum of RM2,102,700.32 which sum is calculated for ease of reference only in accordance with Rule 6(1) of the Employment (Termination and Lay Off

A Benefits) Regulation 1980, and a further sum of RM1,253,138.00 which again for the purpose of calculation only is based on RM200.00 per year of service per Employee, and

(iii) A sum of RM100,000.00 by way of compensation to MBFH for the presence of tenants on the Estate.

B PROVIDED ALWAYS THAT MBFH shall, at its absolute discretion be entitled to utilize the aforesaid monies as in any manner it deems fit.

[9] The cause of action of the appellants for breach of trust emanates from C the abovesaid terms of settlement ('the settlement agreement').

[10] It is pertinent to note that the appellants' claim was solely confined to cl 11(1)(ii) of the settlement agreement for termination and lay-off benefits amounting to RM2,102,700.32 and for services rendered as former employees D to the tune of RM1,253,138. The total sum of the appellants' claim was RM3,355,838.32 only, the sum provided for in cl 11(1)(ii) of the aforesaid settlement agreement.

E **[11]** It was the submission of learned counsel for the appellants that the settlement agreement was deliberately concealed by the fourth, fifth and sixth respondents and was only produced in their bundle of documents some two weeks before the commencement of the trial.

F **[12]** The appellants were then compelled to amend their pleadings to encapsulate the same, to read as follows:

Paragraph 39d.1 satu perintah deklarasi bahawa Defendan ke-Empat yang telah menerima wang pampasan/bayaran daripada The East Asiatic Company (M) Bhd memegang wang tersebut sebagai pemegang amanah dan/atau stakeholder. G

...

Paragraph 25.17 Plaintif-plaintif menyatakan bahawa menerusi pemberian dokumen-dokumen baru pada 23.2.2018 oleh Defendan Pertama, Defendan Ke-2 dan Defendan Ke-3 dan pemberian dokumen-dokumen oleh Defendan ke-4 pada H 9.3.2018 di mana pendedahan (disclosure) dan perakuan oleh Defendan Ke-4 bahawa menerusi writ Saman 81-22-156-95 difailkan di Mahkamah Tinggi Kuala Lumpur di antara MBF Holdings dan East Asiatic Company (M) Bhd di mana syarikat East Asiatic Company (HupSeng Consolidated Bhd) telah pun menyelesaikan pembayaran sebanyak RM7,055,838.30 menerusi perjanjian I penyelesaian bertarikh 8.11.1995 kepada Defendan Ke-4.

25.18 Di dalam penyelesaian tersebut di mana antara lain RM3.6 juta adalah jumlah penyelesaian kepada kesemua pekerja-pekerja iaitu merangkumi Plaintif-plaintif di dalam Mahkamah Tinggi Alar Setar Writ Saman No 22-143-2003 dan juga merangkumi Plaintif-plaintif di dalam tindakan ini.

...

25.20 Plaintif-plaintif menjadi Pemiutang Penghakiman terhadap Defendan Ke-2 pada 4.5.2004 dan kemudiannya setelah taksiran kerugian 'assessment of damages' pada 23.6.2011 di mana pada setiap masa material Defendan Ke-4 (4th Respondent) yang memegang wang penyelesaian untuk 'lay off/termination benefits, relocation benefits, termination damages dan compensation' tidak memaklumkan secara sengaja dana secara frod kepada Plaintif-plaintif.

THE DECISION OF THE LEARNED TRIAL JUDGE

[13] The learned trial judge, amongst others, found as follows:

9. In my judgment, the words in the proviso made it clear that there had been no intent on the part of East Asiatic Company (M) Bhd for there to be a trust over any part of the settlement sum. The discretion of MBF Holdings Bhd to utilise the settlement sum in any way it saw fit would have been incompatible with any notion that the sum, had been paid with the intention that a trust be created over such sums in favour of the plaintiffs.

10. It is also pertinent to note that, although the sums specified in cl 1(ii) of the settlement agreement were derived from the Employment (Termination and Lay-Off Benefits) Regulations 1980, the phrases 'calculated for ease of reference only' and 'for the purpose of calculation only' were pointedly used in the provision of the contract, which made it clear there was no intention for such sums to be held over for the benefit of the plaintiffs.

[14] The learned trial judge went further in the following paragraphs:

17. On the facts of this case, MBF Holdings Bhd was an incoming purchaser of lands occupied by the plaintiffs. It had made an offer or employment to those employees of the East Asiatic Company (M) Bhd who had been employed at Padang Meiha, consistent with its contractual obligations to the East Asiatic Company (M) Bhd. Any termination or lay-off benefits would have been owed by East Asiatic Company (M) Bhd to the employees who had elected not to accept the offer of employment from MBF Holdings Bhd. In such circumstances, I can see no justification for holding that MBF Holdings Bhd, as the incoming purchaser and prospective legal owner of the estate, would owe any duties fiduciary or otherwise — to the plaintiffs, who are strangers to it. If no duties are owed, then there would be no question of any breach of any duty as would justify the imposition of a constructive trust.

18. Nor can it be said that it would be unconscionable for the fourth defendant to exert its rights over the sums paid under cl 1(ii) to the exclusion of the plaintiffs, when all it was doing was to put into effect the express contractual understanding that it had with the East Asiatic Company (M) Bhd.

19. For these reasons, I am constrain to dismiss the plaintiffs' claims in its entirety, as against the fourth, fifth and sixth defendants.

A THE SUBMISSIONS BEFORE US

[15] Learned counsel for the appellants submitted that the learned trial judge erred when he found that the appellants were strangers vis a vis the said settlement agreement, having read the said terms in isolation without regard to the recitals of the settlement agreement which specifically addressed the position of the appellants in the whole scheme of events.

[16] It was also submitted that the learned trial judge erred when he found that the fourth respondent was the incoming purchaser of lands occupied by the appellants and as such there was no justification for the fourth respondent to owe fiduciary duties or otherwise as the appellants were strangers to the settlement agreement when the evidence showed that as the new buyer, the fourth respondent took ownership of the said land subject to the sum stated in cl 11(1)(ii) which were to be held on trust for the appellants and thereby owed a fiduciary duty over the same.

[17] Finally, it was contended by the appellants that the learned trial judge erred when he held that the proviso to cl 11(1) made it clear that there had been no intent on the part of EACM for there to be a trust over any part of the settlement sum.

[18] On the other hand, learned counsel for the respondents submitted that in respect of the settlement sum received pursuant to the settlement agreement, the fourth and fifth respondents have pleaded that it has absolutely no obligation whatsoever to hold the same on trust or as stake holders for the appellants and the appellants are not entitled to the said sum whatsoever. Meanwhile the sixth respondent pleaded that it is the current registered and beneficial owner of the estate for valuable consideration and had purchased the estate in good faith.

[19] Learned counsel also submitted that the learned trial judge was entirely correct in finding the non-existence of trust in any form or kind. The appellants were strangers to the settlement agreement and are barred from adding, varying or substituting clauses therein. The appellants were attempting to interpret the settlement agreement creating a trust in favour of the appellants merely because their names were included in the Schedule and that the settlement sum had to be paid to them, is expressly contrary to cll 1 and 4 of the settlement agreement — see pp 177–178 of the (CB Vol 1). It was submitted that cl 11(1) is clear and unambiguous and its literal application was given effect by the trial judge in support of the fourth respondent's contention that it was allowed to utilise the settlement sum at its absolute discretion.

[20] It was further submitted that the learned trial judge was correct in adopting the literal approach to interpret the settlement agreement as priority should be given within the four corners of the agreement. Applying the ordinary words used, cl 11(1)(i), (ii) and (iii) merely explains the breakdown of the settlement sum and also explained that the same is derived based on calculating the ex gratia payments to EACM's ex-employees without any admission of liability on the part of EACM to pay the ex-workers the compensation. The proviso to cl 11 also provides that the fourth respondent is entitled to utilise the settlement sum in any way it deems fit.

[21] It was also submitted that it was for the appellants to produce evidence, and the appellants had failed to do so to discharge the burden of their assertion of the existence of a trust over the said settlement sum of any kind.

OUR DECISION

[22] We were in full agreement with the submission that the trial judge erred in failing to consider the clear and express intention of both EACM and MBFH (the fourth respondent) when they executed the settlement agreement, in particular, the appellants' entitlements to the termination and lay-off benefits and other sums as stipulated in the said agreement.

[23] It is very apparent that both the parties had the interest of the appellants in mind as one of the core issues to be ironed out in the settlement agreement. Clause 11(1)(ii) very clearly addressed the issues in no uncertain terms. The mechanism as to how the sums were computed and how the sums were to be distributed were also clearly stated.

[24] The recitals to the settlement agreement is further evidence of the agreement's purport and intention of the parties therein. It refers specifically to the 9 March 1994 SPA, adverted to in para 3 above. It is trite law that recitals of an agreement forms part of an agreement — see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719.

[25] There were two recitals to the settlement agreement which is of immense importance, reproduced below:

> (2) The persons whose names appear in Schedule 1 hereto ('the Employees') were the employees of EACM at the Estate and were occupying part of the Estate by virtue of such employment.
>
> (3) By a sale and purchase agreement dated 9th March 1994 ('the SPA') entered between EACM and MBFH, EACM agreed to sell and MBFH agreed to purchase the estate at a purchase price of RM115,878,492.00 and subject to all the terms and conditions therein.

[26] In addition, cl 3.2 of the 9 March 1994 SPA (at p 153 of CB Vol 1) contained specific provisions relating to the entitlement of compensation to the employees of PME, in particular that '... MBF undertakes to EACM against all claims and payments which EACM shall be required by law or the said Collective Agreements to pay to such employees by reason of the failure of MBF to do so ...'.

[27] It was apparent that both the 9 March 1994 SPA and the settlement agreement, with the said recitals, had considered the plight of the employees of PME and their pending entitlements to compensation pursuant to the sale and purchase of PME. It was further apparent that the parties had intended to crystalise the entitlements of the former employees of PME, and that the same was manifested clearly in cl 11(1)(ii) of the settlement agreement.

[28] The learned trial judge had visibly ignored cl 3.2 of the 9 March 1994 SPA, the terms of the recitals and schedule 1 therein which nonetheless formed part of the settlement agreement. This cannot be the correct approach in the interpretation of the settlement agreement. All the more so when schedule 1 to the settlement agreement had listed down the persons who were the employees of PME. The names on the list include all the appellants in this action.

[29] Hence, it begs the further issue why and for what purpose were the names of the appellants listed in schedule 1? We conclude that it is a clear indication that the parties had all along agreed to reserve the sums mentioned in cl 11(1)(ii) of the settlement agreement for the eventual distribution to the appellants. They recognised the appellants' entitlements as the former employees of PME and that the said sums were meant to satisfy the simmering claims of the appellants in respect of their termination benefits, lay-off benefits and other payments incidental to the termination of their employments in accordance with the 9 March 1994 SPA, which has not been settled by EACM for one reason or another.

[30] In our view, the learned trial judge took a very simplistic approach of the issues at hand and had ignored the true purport and intent of the parties when they executed the settlement agreement.

[31] In addition, in view of the clear and unambiguous express intention of the parties as covenanted and the entitlement of the appellants to the sums stated in cl 11(1)(ii) which is equally clear and unambiguous, the appellants cannot be treated as strangers to the settlement agreement. Clearly, they were the rightful beneficiaries of the settlement agreement.

[32] Under the prevailing circumstances, there can be no doubt that the respondents were holding the said sums as trustees or stakeholders on behalf of the appellants prior to its distribution/disbursal to the appellants. In fact the learned trial judge had even cited the House of Lords case of *Carl Zeiss Stiftung v Herbert Smith & Co And Another (No 2)* [1969] 2 Ch 276 where it was held that a constructive trust can be imposed by equity in order to satisfy the demand of justice and good conscience.

[33] Learned counsel for the appellants also brought our attention to the following passage in *Bank Bumiputra Malaysia Bhd v Mohamed bin Salleh* [2000] 2 MLJ 412; [2000] 2 CLJ 13, a decision of this court, at p 415 (MLJ); pp 16–17 (CLJ):

> Before us Mr N Chandran with his usual ability sought to attack the judgment of the High Court. He has principally addressed us on the absence of a privity of contract in the circumstances of the present case. The short answer to Mr Chandran's argument is to be found in the following passage in the judgment of Lush LJ, in *Lloyd's v Harper* [1880] 16 Ch D 290, where (at p 321) he said:
>
> > I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.
>
> *Cheshire, Fifoot & Furmston's Law of Contract* 13th Ed (at p 467) make the following comment on Lush LJ's observation:
>
> > Implicit in this statement is the conclusion that if A fails in his duty B, the beneficiary under — the implied trust, may successfully-maintain an action to which A and the other contracting party are joint defendant.
>
> It is quite true that Courts of Equity have been careful not to permit a litigant from relying on the concept of constructive trust willy-nilly. Decisions of the English Courts show that the device of a constructive trust is not to be readily inferred in the absence of a clear intention to create a trust (see *Green v Russell* [1959] 3 WLR 17; *Re: Schebsman* [1994] Ch 83). However as we understand the principle, equity has always recognised the trust of a benefit of a contract. The decision of the House of Lords in *Beswick v Beswick* [1968] AC 58 merely reinforces that principle.

[34] In our view, the facts and evidence adduced and the expressed intention of the parties therein, invariably led to the fair inference that a constructive trust was created in respect of the sums provided in cl 11(1)(ii) in favour of the appellants.

[35] We were further of the view that, contrary to the findings of the learned trial judge, it would be plainly unconscionable for the fourth respondent to exert its rights over the sums paid under cl 11(1)(ii) of the settlement agreement to the exclusion of the appellants when the said sums was not meant for the fourth respondent from the very beginning.

A PROVISO TO CL 11(1) OF THE SETTLEMENT AGREEMENT

[36] The proviso to cl 11(1) provides:

> PROVIDED ALWAYS THAT MBfH shall, at its absolute discretion be entitled to utilize the aforesaid-monies-as and in any manner it deems fit.

B

[37] The learned trial judge construed the said proviso as negating any intention on the part of EACM to create a trust over any part of the settlement sum. The discretion conferred upon the fourth respondent to utilise the C settlement sum in any way it saw fit would have been incompatible with any notion that the sum had been paid with the intention that a trust be created over such sums in favour of the appellants.

D **[38]** Nevertheless, it is our considered view that the discretion conferred by the proviso cannot be construed in the manner as construed by the learned trial judge as this will render the said terms of the agreement otiose.

[39] Furthermore, the appellants are not strangers to the settlement E agreement by virtue of schedule 1 of the same where the employees of PME were all listed down. Also, the settlement agreement must be read with the 9 March 1994 SPA as the recitals to the settlement agreement made reference to the said SPA, wherein provisions pertaining to the rights of the appellants upon termination of their employments pursuant to the said SPA were F incorporated.

[40] In our view, on account of the appellants' entitlements as stated clearly in cl 11(1)(ii) and the said two recitals, all of which relates to the employees of PME, the said proviso cannot have the effect of completely negating the said G provisions (cl 11(1)(ii)) which are clearly intended for the benefit of the employees of the PME.

[41] Hence, for all the reasons given, we opined that the said proviso cannot H be read and given a literal interpretation but must be given a purposive construction, based on the true purport and expressed intention of the contracting parties. Otherwise, as stated earlier, it will render the terms of the said settlement agreement otiose or redundant — see *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ I 413. It should thus be construed to recognise and give effect to the entitlements of the appellants for termination and lay-off benefits and other payments incidental thereto, as provided under cl 11(1)(ii) of the settlement agreement.

CONCLUSION

[42] For all the reasons enumerated above, we allowed the appellants appeal with RM20,000 as cost (here and below and subjected to the payment of allocator). The order of the learned trial judge is henceforth set aside and substituted with an order:

(a) that MBF Holdings Bhd is to pay the sum of RM3,355,838.82 in accordance with para (ii) of the settlement agreement dated 8 November 1995 into the appellants' counsel account as stakeholder for the purpose of paying the same to the nominees as listed in schedule 1 of the settlement agreement. Payment of the said sum shall be made within one month from the date of service of this order;

(b) the appellants' counsel shall make payment to the nominees within three months from the date of receipt of the said sum from MBF Holdings Bhd;

(c) the appellants must vacate the said land and surrender the vacant possession of the land within six months after the receipt of the compensation under the said para (ii);

(d) upon making all the above payment, any surplus (if any) shall be returned to the MBF Holdings Bhd; and

(e) deposit, if any, to be refunded to the appellants.

Appeal allowed and order of trial judge set aside.

Reported by Ahmad Ismail Illman Mohd Razali